

**** E-filed March 3, 2011 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FANG-YUH HSIEH,

No. C10-05629 HRL

Plaintiff,

**ORDER (1) GRANTING DEFENDANT
PHILIP LAVORI'S MOTION TO
DISMISS AND (2) DENYING
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

v.

STANFORD UNIVERSITY, et al.,

[Re: Docket Nos. 10, 14]

Defendants.

Pro se plaintiff Fang-Yuh Hsieh ("Hsieh"), who is now 61 years old, was employed by the United States Department of Veterans Affairs's ("VA") Cooperative Studies Program Coordinating Center in Palo Alto, California ("Palo Alto VA-CSPCC"), as a mathematical statistician from 1994 to 2002. Docket No. 1 ("Complaint") ¶ 3.

Hsieh previously claimed he was harassed and terminated in 2002 after he complained to his supervisor, Dr. Philip Lavori ("Lavori"), about discriminatory treatment. Hsieh sued the VA and Lavori in 2006 based on this alleged conduct, and that case resulted in summary judgment for the VA and Lavori, a judgment upheld on appeal. See Hsieh v. Peake, et al., No. C06-05281 PJH ("Hsieh I"). Following that action, Hsieh sued the VA, Lavori, and Stanford University ("Stanford") for discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), based on those defendants' failure to hire him for numerous positions for which he applied in 2008

1 and 2009. See Hsieh v. Stanford University, et al., No. C09-05455 HRL (“Hsieh II”). In that action,
 2 which is still pending, this Court dismissed with prejudice Hsieh’s claims against Lavori because
 3 Hsieh did not exhaust his administrative remedies prior to filing suit and because Lavori is not a
 4 proper defendant under Title VII and the ADEA. Hsieh II, Docket No. 45.

5 Now, Hsieh has filed the instant age discrimination action against Stanford and Lavori
 6 (collectively, “Defendants”) for violation of the ADEA (“Hsieh III”). He alleges that on August 25,
 7 2010 he applied for a biostatistician position at Stanford University but that, despite his ample
 8 qualifications, he did not get the job. Complaint ¶ 7. According to Hsieh, the hiring manager for the
 9 position contacted Lavori, who did not give Hsieh a good reference. Id. Hsieh further alleges that,
 10 rather than hiring him, Stanford made an offer to a “younger and less qualified individual,” who
 11 thereafter declined the offer. Id. Stanford also allegedly kept the position open and has continued to
 12 seek other applicants for the job. Id. Hsieh thus claims that Stanford and Lavori discriminated
 13 against him because of his age and have “blacklisted and blackballed” him because of his previous
 14 complaints against Lavori. Id. ¶¶ 1, 7.

15 Just as he did in Hsieh II, Lavori moves here to dismiss the claim against him because Hsieh
 16 again failed to exhaust his administrative remedies and because he is not subject to the ADEA.
 17 Docket No. 10 (“MTD”). Hsieh opposes Lavori’s motion (Docket No. 18), and oral argument is set
 18 for March 8, 2011.

19 In addition to Lavori’s motion, Hsieh moves for entry of default judgment against Stanford
 20 and Lavori. Docket No. 14 (“Motion for Default Judgment”). Stanford and Lavori oppose Hsieh’s
 21 motion (Docket No. 21), and oral argument on this motion is set for March 8, 2011 as well.

22 Pursuant to Civil Local Rule 7-1(b), the Court finds these matters suitable for determination
 23 without oral argument, and the March 8, 2011 hearings are vacated.¹

24 DISCUSSION

25 A. Lavori’s Motion to Dismiss

26 1. Lack of Subject-Matter Jurisdiction

27
 28 ¹ Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

1 A party may raise a lack of subject-matter jurisdiction by motion prior to filing an answer to
2 a complaint. FED. R. CIV. P. 12(b)(1). If the court determines that it does not have subject-matter
3 jurisdiction, it must dismiss the claim. FED. R. CIV. P. 12(h)(3). A lack of jurisdiction is presumed
4 unless the party asserting jurisdiction establishes that it exists. Kokkonen v. Guardian Life Ins. Co.
5 of Am., 511 U.S. 375, 377 (1994).

6 Lavori argues that the Court lacks subject-matter jurisdiction over Hsieh's ADEA claim
7 against him because he failed to exhaust his administrative remedies. MTD at 3-4. In so arguing, he
8 correctly explains that a plaintiff may not initiate a civil action under the ADEA "until at least sixty
9 days after the filing of age discrimination charges with the EEOC and with an appropriate state
10 agency." Dempsey v. Pac. Bell Co., 789 F.2d 1451, 1452-53 (9th Cir. 1986); see also 29 U.S.C. §§
11 626(d), 633(b).

12 Hsieh's Charge of Discrimination, which is attached as Exhibit A to his complaint, only
13 identifies Stanford as having allegedly discriminated against him and does not mention Lavori at all.
14 See Complaint, Ex. A. In fact, Hsieh has not so much as even asserted that he first filed a timely
15 charge with the EEOC against Lavori so as to establish that this Court has subject-matter
16 jurisdiction over the ADEA claim. See generally, Complaint. As it did in Hsieh II, the Court must
17 dismiss the ADEA claim against Lavori.

18 2. Failure to State a Claim

19 Lavori also argues that Hsieh's claim against him fails because he cannot be sued under the
20 ADEA. MTD at 4-5. Hsieh does not address Lavori's claim of a statutory bar in his opposition.

21 Lavori is correct that he is not a proper defendant under the ADEA. The ADEA defines
22 "employer" to include "a person engaged in an industry affecting commerce who has twenty or
23 more employees for each working day in each of twenty or more calendar weeks in the current or
24 preceding calendar year" as well as "any agent of such a person." 29 U.S.C. § 630(b). But Congress
25 only meant by this definition to extend *respondeat superior* liability to employers — it did not
26 intend to extend liability to individuals. Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 588 (9th Cir.
27 1993); see also Heilman v. Memeo, No. 08-16705, 2009 WL 4912629 (9th Cir. Nov. 20, 2009)
28 ("[A] supervisor cannot be held liable in his individual capacity for violating the ADEA."). As the

1 Court already explained in Hsieh II, Hsieh cannot sue Lavori here as an individual under the ADEA.
2 His claim will be dismissed with prejudice.

3 B. Hsieh's Motion for Default Judgment

4 Hsieh contends that Stanford and Lavori did not timely respond to the complaint. Motion for
5 Default Judgment at 2-3. The parties offer competing descriptions of just how service of the
6 summons and complaint was (or was not) accomplished. Even under Hsieh's version, he does not
7 demonstrate that he properly served Defendants. More importantly, though, even if he had, default
8 judgment should not be granted because he cannot meet the factors courts must consider when faced
9 with such a motion. See Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In particular,
10 default judgment is inappropriate where a defendant files a responsive pleading prior to a plaintiff's
11 motion and where the plaintiff cannot show prejudice resulting from the untimely filing. Draper v.
12 Coombs, 792 F.2d 915, 924-25 (9th Cir. 1986) ("[Plaintiff] has not made any showing of prejudice
13 as a result of [defendant's] failure to comply strictly with the time requirements of the Federal Rules
14 of Civil Procedure. We therefore cannot conclude that the district court abused its discretion in
15 denying the motions for a default judgment.") (citing Aldabe v. Aldabe, 616 F.2d 1089, 1092-93
16 (9th Cir. 1980); Lau Ah Yew v. Dulles, 236 F.2d 415, 416 (9th Cir. 1956)). Here, Stanford answered
17 Hsieh's complaint and Lavori moved to dismiss six days before Hsieh filed his motion for default
18 judgment. Hsieh has not shown that he was prejudiced by any delay. See Docket Nos. 8, 10. His
19 motion is devoid of merit.

20 **CONCLUSION**

21 Based on the foregoing:

22 A. Lavori's motion to dismiss is GRANTED and Hsieh's ADEA claim against him is dismissed
23 with prejudice;

24 B. Hsieh's motion for default judgment is DENIED.

25 **IT IS SO ORDERED.**

26 Dated: March 3, 2011

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28 _____
HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

C10-05629 HRL Notice will be electronically mailed to:

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